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### The Unclaimed Life Insurance Funds Act

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lief to the stakeholder. The basis for its constitutionality also seems sound.<sup>87</sup> None the less, it is more advisable to proceed wherever possible under Section 287 of the Civil Practice Act, or the Federal Interpleader Act<sup>88</sup> not only because they have survived constitutional tests, but because the relief thereunder is quicker; under the new statute as much as one year might pass before a case is disposed of.<sup>89</sup> At any rate, if the legislation proves as successful as it is hoped, the Statute of Limitations will become an important weapon in the hands of the Legislature with which it can overcome jurisdictional obstacles in the courts. From the economic point of view, the statute should be an important factor in relieving American businessmen of fear and danger in doing business with foreign citizens.

SAMUEL M. SINGER.

**THE UNCLAIMED LIFE INSURANCE FUNDS ACT.**—The economic plague has, for the last ten years, devastated the financial fields, consumed all the fruits of prosperity investments, exhausted all accumulated reserves and rendered unbearable the burden of the taxpayer. It has constrained the legislatures to enact more and more revenue legislation. The New York Legislature, in its quest for new modes of taxation, has discovered a new source for revenue, the unclaimed funds in the domestic life insurance corporations.

On June 17, 1939, Governor Lehman had the choice of signing one of two bills<sup>1</sup> on the same subject. He signed the McNaboe bill, which immediately became the law.<sup>2</sup> The draftsmen, in planning the bill, intended, to use the proverbial saying, to kill two birds with one stone. Not only was the bill designed to alleviate the troublesome details confronting the life insurance corporations in their safeguarding the funds of forgetful policyholders,<sup>3</sup> but also to add new income to the coffers of the state treasury, and this, perhaps, was the primary purpose of the legislation.<sup>4</sup>

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<sup>87</sup> See note 59, *supra*.

<sup>88</sup> See note 3, *supra*.

<sup>89</sup> See note 22, *supra*.

<sup>1</sup> The McNaboe bill (Senate No. 2896) and the Hampton bill (Senate No. 2962), both imposing similar requirements on domestic life insurance corporations, were presented to the Governor for signature. The Governor vetoed, without memorandum, the Hampton bill.

<sup>2</sup> N. Y. Laws 1939, c. 923, §§ 295-299; N. Y. INS. LAW §§ 295-299; N. Y. STATE FINANCE LAW § 44-h.

<sup>3</sup> According to Mr. Morris H. Siegel, the insurance counselor and director of the Policyholders Advisory Council who helped prepare the bill, the Metropolitan Life Insurance Corporation alone in its industrial department is holding \$250,000,000 in reserves on lapsed policies.

<sup>4</sup> Mr. Siegel estimates that with the McNaboe bill the State of New York should receive approximately \$25,000,000 in the first year of the law's operation,

## I.

In substance, this seemingly novel piece of legislation<sup>5</sup> requires every insurer<sup>6</sup> to file with the Superintendent of Insurance, on or before the tenth day of November in each year, a statement of unclaimed or abandoned funds due to beneficiaries.<sup>7</sup> In addition, the insurers are to publish such statement, annually, in a newspaper<sup>8</sup> designated by the superintendent and to pay<sup>9</sup> over to the state comptroller, on or before April tenth of each year, all the funds unclaimed for a definite period of time.<sup>10</sup> The comptroller, upon receiving the unclaimed funds, is directed to deposit three-fourths of the amount thereof into the state treasury, to the credit of the general fund, and to retain the remaining one-fourth as a special fund, which is to be used for the payment of claims made by the persons to whom the funds belong.<sup>11</sup> After paying an unclaimed fund to the comptroller,

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and, thereafter, three to four million dollars each year. However, the insurance companies warn the revenue-raisers that they are disillusioned, for there are no vast sums to be garnered from unclaimed life insurance proceeds, and that they are sure to be less and less. See *EASTERN UNDERWRITER*, May 26, 1939, p. 16.

<sup>5</sup> Other states have endeavored to provide for the surrender of unclaimed insurance funds to the state. Mass. Gen. Laws 1921, p. 2381 made such provision, but this law was repealed by Mass. Gen. Laws 1921, c. 426.

<sup>6</sup> The term "insurer" means and includes any *domestic* life insurance corporation, or any person, partnership or association duly organized under the laws of this state to transact life insurance business, or to grant, purchase or dispose of annuities. It also includes any savings and insurance bank organized under the laws of New York. See N. Y. INS. LAW § 295, subd. 1.

<sup>7</sup> *Id.* § 296 (The report is to be verified by an officer of the insurer and shall contain as to each unclaimed fund alphabetically (1) the full name of the insured, his last post-office address and his number and his policy age; (2) the amount due under the policy; and (3) the full name of each beneficiary and his last known address).

<sup>8</sup> *Id.* § 297 ("Any amount paid to a newspaper for such publication may be charged equally against the amounts owing to the persons whose names were published but it shall be unlawful to make any other charges against such amounts").

<sup>9</sup> *Id.* § 298. By a communication of September 26, 1939, the writer has been informed by Mr. Nathan R. Sobel, counsel to the Governor of New York and one of the draftsmen of the Act, of the fact that he had learned that the life insurance corporations, because of objections based on substantive legal questions, will refuse to turn over unclaimed funds to the state until ordered to do so by the courts. Mr. Robert B. Bacon, the assistant attorney for the Association of Life Insurance Presidents, has likewise, in a communication of August 29, 1939, apprised the writer of the fact that most of the life insurance companies are already engaged in preparing test litigation to determine the validity of this Act.

<sup>10</sup> *Id.* § 295, subd. 2(a)-2(e) (Any funds, due and payable under a *matured policy*, which remain unclaimed for a period of at least *seven years* from the date of maturity of such policy, are unclaimed funds. And the reserve under an automatic *non-forfeiture policy* on which the premiums have not been paid for at least *five years* and the insured has failed to notify the insurer that he was aware of the continued operation of the policy by virtue of the non-forfeiture clause, after the latter had requested him to do so on a specified date, also constitutes an unclaimed fund).

<sup>11</sup> N. Y. STATE FINANCE LAW § 44-h, subd. 1 ("Such special fund shall be

the insurer is relieved from liability on the fund as to the amount of such payment.<sup>12</sup> However, such payment by an insurer does not preclude the insured from filing, against the insurer, a claim in excess of the amount paid over to the comptroller.<sup>13</sup>

## II.

The courts have assiduously sustained the right of a state to take measures to protect and conserve property within its jurisdiction which has no *known* owner.<sup>14</sup> The courts have also recognized the power of a state to found proceedings for the escheat of property upon the presumption of death arising from the failure to locate the owner or his living heirs.<sup>15</sup> The statute under consideration is not one of escheat,<sup>16</sup> for the Legislature, in authorizing the comptroller to receive in payment the unclaimed funds, did not proceed on the theory of "*bona vacantia*", i.e., that the insured had died leaving no living heirs who could lawfully succeed to the fund.<sup>17</sup> The Act does not provide for the *seizure* of property presumed to be without an owner, but rather for the *transfer of possession* of the unclaimed

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deposited in one or more state banks, trust companies or savings banks. Any interest received by the comptroller upon any deposit of unclaimed funds shall be the property of the state").

<sup>12</sup> N. Y. INS. LAW § 299.

<sup>13</sup> *Ibid.* (In such a case, the insurer's liability is limited to the amount of the excess, and the insured, if he wishes to recover the reserve under his policy which has been paid to the comptroller as an unclaimed fund, must file a claim for the same against the comptroller, who is granted full and complete authority to accept or reject any such claim). N. Y. STATE FINANCE LAW § 44-h, subd. 2 (If the comptroller rejects such a claim, the claimant may apply to the supreme court, upon giving ten days' notice to the comptroller, "for an order to show cause why the comptroller should not accept and pay any such rejected claim").

<sup>14</sup> *Cunnius v. Reading School District*, 198 U. S. 458, 25 Sup. Ct. 721 (1905); *Provident Institute for Savings v. Malone*, 221 U. S. 660, 31 Sup. Ct. 661 (1911), *aff'g*, 201 Mass. 23, 86 N. E. 912 (1909).

<sup>15</sup> *Mobile, J. & K. C. R. R. v. Turnipseed*, 219 U. S. 35, 31 Sup. Ct. 136 (1910); *Security Savings Bank v. State*, 263 U. S. 282, 44 Sup. Ct. 108 (1923).

<sup>16</sup> *Sands v. Lynham*, 27 Gratt 291 (Va. 1876) (The word "escheat" is of French or Norman derivation, meaning chance or accident); 19 AM. JUR. (1939) p. 380, § 2 ("In its most comprehensive scope escheat means the reversion or forfeiture of property to the government upon the happening of some chance, event or default"); *State v. Savings Union Bank & Trust Co.*, 186 Cal. 294, 199 Pac. 26 (1921) (Under the ancient English common law there were two kinds of escheats—first, where the owner of land died, leaving no heirs so that the land reverted to and vested in the king, who "was esteemed in the eye of the law the original proprietor of all the lands in the kingdom"; second, where the owner forfeited his land to the king by attainder for a felony or treason. Thus, historically it is incorrect to apply the term "escheat" to personalty, but now the term is applied indiscriminately to all property abandoned and in want of persons entitled to make a legal claim thereto).

<sup>17</sup> *Provident Institute for Savings v. Malone*, 221 U. S. 660, 31 Sup. Ct. 661 (1911), *aff'g*, 201 Mass. 23, 86 N. E. 912 (1909).

funds into "*custodia legis*"<sup>18</sup> The payment of the funds to the comptroller is not in the nature of a statutory forfeiture of the funds to the state.<sup>19</sup> Although the state is allowed to use the greater part of the funds for its own purposes, the statute is not intended solely for the benefit of the state. It also contemplates the preservation of the apparently abandoned funds on the general principle that corporations may become insolvent, or may be dissolved, or that after a lapse of time changes may occur which would require someone to look after the insured's rights.<sup>20</sup>

There can be no doubt that the Act is constitutional insofar as it requires the filing of reports<sup>21</sup> with the superintendent, the publishing of notices<sup>22</sup> and the payment of unclaimed funds arising under matured life insurance policies.<sup>23</sup> To carry on the sale of life insurance is to engage in a public or quasi-public business.<sup>24</sup> Such business is bound to affect the commercial welfare and property interests of individuals, and so must lend itself to the legislative regulation of the state in the exercise of its police power.<sup>25</sup> It is a settled rule that corporations, as creatures of the state, are, in respect to their affairs, subject to the laws of the creating state, unless such laws prevent the attainment of the corporate ends.<sup>26</sup> The regulation imposed by the Act in reference to unclaimed proceeds on matured policies is reasonable and in no way interferes with the life insurance corporations in their doing of business according to their charters.<sup>27</sup>

Moreover, the provisions of the Act referring to matured policies are constitutional irrespective of the doctrine of police power. They are in harmony with the "due process" clauses of the federal and state constitutions.<sup>28</sup> They do not deprive the insured of his

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<sup>18</sup> It is a transfer to the sovereign state, which takes it in the capacity of a conservator for the benefit of any person lawfully entitled to it. See *Security Savings Bank v. State*, 263 U. S. 282, 44 Sup. Ct. 108 (1923); *Commonwealth v. Dollar Savings Bank*, 259 Pa. 138, 102 Atl. 569 (1917).

<sup>19</sup> *Brown v. McPherson*, 277 Mich. 396, 269 N. W. 211 (1936).

<sup>20</sup> *Commonwealth v. Dollar Savings Bank*, 259 Pa. 138, 102 Atl. 569 (1917); *Cope v. Cope*, 137 U. S. 682, 11 Sup. Ct. 222 (1891) (Indeed, the disposition of property within its jurisdiction is a matter exclusively of state cognizance).

<sup>21</sup> N. Y. INS. LAW § 296.

<sup>22</sup> *Id.* § 297.

<sup>23</sup> *Id.* § 295, subds. 2(a), (d) and (e). See *Commonwealth v. Dollar Savings Bank*, 259 Pa. 138, 102 Atl. 569 (1917).

<sup>24</sup> *Bean v. Stoddard*, 238 N. Y. 581, 144 N. E. 900 (1924); *People v. Loew*, 19 Misc. 248, 44 N. Y. Supp. 42 (1896).

<sup>25</sup> *Brunstein v. New Amsterdam Casualty Co.*, 255 N. Y. 137, 174 N. E. 304 (1931); *People ex rel. Moore v. Holmes*, 151 App. Div. 257, 135 N. Y. Supp. 467 (4th Dept. 1912).

<sup>26</sup> *First Nat. Bank of San Jose v. State*, 262 U. S. 366, 43 Sup. Ct. 602 (1923); *First Nat. Bank v. Missouri*, 263 U. S. 640, 44 Sup. Ct. 213 (1923).

<sup>27</sup> *Provident Institute for Savings v. Malone*, 221 U. S. 660, 31 Sup. Ct. 661 (1911), *aff'd*, 201 Mass. 23, 86 N. E. 912 (1909); *Security Savings Bank v. State*, 263 U. S. 282, 44 Sup. Ct. 108 (1923).

<sup>28</sup> U. S. CONST. Amend. XIV, § 1 (no state shall deprive "any person of life, liberty, or property without due process of law"); N. Y. CONST. Art. I,

property without due process. The owner of the fund is not deprived of any right of ownership, for as soon as his fund is transferred to the state he is afforded an action against the state where, without a limitation of time, he or his lawful representatives may identify themselves and prove their claim.<sup>29</sup> Similarly, no property rights of the insurers are invaded under these provisions. They may argue that the provisions will work a deprivation of the property rights which they have in the funds by denying them the opportunity of earning profits concomitant with the possession of such funds.<sup>30</sup> In reply to this argument it may be said that the contracts of insurance do not create anything in the nature of a tontine right,<sup>31</sup> under which, upon the dissolution of a corporation, the then policyholders would share in the disposition of the funds of those absent and unknown.<sup>32</sup>

Furthermore, these provisions,<sup>33</sup> although retroactive in application, and pertaining to all unclaimed funds arising under matured policies even though the policies were taken out prior to the enactment of the Act,<sup>34</sup> do not abrogate any existing contracts.<sup>35</sup> In selling an insurance policy, the insurer agrees to pay the sum stipulated therein upon its maturity. When the policy matures, it becomes an executed contract as far as the insured is concerned and there only remains a duty on the insurer to pay the stipulated sum to the beneficiary.<sup>36</sup> But the beneficiary cannot be found, and so the state steps in and collects the due sum as a trustee of the missing owner. This procedure violates no rights of the insurer since it has no tontine right to the fund, and the state may take the fund as a conservator, as we have seen. To hold otherwise would be to support a proposition that the contract of insurance was made to continue for all time, even if the owner of the benefice under the policy should die without lawful heirs, so that his property would become subject to escheat.<sup>37</sup>

There is nothing unequal or discriminatory in confining the application of this Act to unclaimed funds in life insurance corpora-

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§ 6 ("No person shall be deprived of life, liberty or property without due process of law"); N. Y. CONST. Art. I, § 7, subd. (a) ("Private property shall not be taken for public use without just compensation"). See *Cunnius v. Reading School District*, 198 U. S. 458, 25 Sup. Ct. 721 (1905).

<sup>29</sup> N. Y. STATE FINANCE LAW § 44-h, subds. 2 and 3.

<sup>30</sup> *State v. Security Savings Bank*, 154 Pac. 1070 (Cal. App. 1915).

<sup>31</sup> BLACK, LAW DICTIONARY (2d ed. 1910) 1161 ("In French Law a species of association or partnership formed among persons who are in receipt of perpetual or life annuities, with the agreement that the shares or annuities of those who die shall accrue to the survivors. This plan is said to be thus named from Tonti, an Italian, who invented it in the seventeenth century").

<sup>32</sup> *Security Savings Bank v. State*, 263 U. S. 282, 44 Sup. Ct. 108 (1923).

<sup>33</sup> N. Y. INS. LAW §§ 295, subds. 2(a), (b) and (e), 296 and 297.

<sup>34</sup> *Id.* §§ 295, subds. 2(a), (d) and (e) and 298.

<sup>35</sup> U. S. CONST. Art. I, § 10, cl. 1 ("No State shall \* \* \* pass any \* \* \* Law impairing the Obligation of Contracts \* \* \*").

<sup>36</sup> *Slisberg v. N. Y. Life Ins. Co.*, 244 N. Y. 482, 155 N. E. 749 (1927).

<sup>37</sup> *Malone v. Provident Institute for Savings*, 201 Mass. 23, 86 N. E. 912 (1909), *aff'd*, 221 U. S. 660, 31 Sup. Ct. 661 (1911); *Brown v. McPherson*, 277 Mich. 396, 269 N. W. 211 (1936).

tions.<sup>38</sup> This fact alone does not subject the Act to the objection that it is "special legislation".<sup>39</sup> In view of the "relation which it bears to the fiscal affairs of the people and the revenues of the state" the state is justified in making classification segregating life insurance corporations from the general law applicable to corporations.<sup>40</sup>

However, the Act presents a serious question in its application to unclaimed funds belonging to persons residing in foreign jurisdictions.<sup>41</sup> The question may be posed as to whether the state may validly take into its custody unclaimed funds belonging to insureds holding policies of domestic life insurance corporations, but domiciled in other states. It is a universal rule that a state has no power over property outside its jurisdiction.<sup>42</sup> Since intangible property, such as debts, have no territorial situs,<sup>43</sup> under the maxim, "*mobilia sequuntur personam*", it follows its owner,<sup>44</sup> and, consequently, the domicile of the owner of such property has jurisdiction over it.<sup>45</sup> Unclaimed funds held by life insurance corporations are not property in the hands of the corporations, but rather they are debts or obligations of the insurers.<sup>46</sup> Thus, it may be argued that funds, as intangible property, follow the creditor, the beneficiary, into his domicile, and, therefore, New York could have no jurisdiction over funds belonging to residents of another state. However, it is to be observed that it is the *power of control* over the *res*, rather than *situs* which gives a state jurisdiction over it.<sup>47</sup> *Situs* is only important inasmuch as it is an aid to the state in controlling property.<sup>48</sup> In reality, the domicile of the debtor may also have control over the intangible property of a foreign creditor.<sup>49</sup> The domicile of the debtor has control over the debtor inasmuch as it may compel the debtor to pay the debt in an action brought by the creditor to recover the debt, and indirectly, therefore, it has control over the debt.<sup>50</sup>

The Supreme Court of the United States has been somewhat inconsistent in respect to the doctrine of "*mobilia sequuntur per-*

<sup>38</sup> *Germantown Trust Co. v. Powell*, 265 Pa. 71, 108 Atl. 441 (1919).

<sup>39</sup> *Ibid.* (Frazer, J., said: "\* \* \* Classification is a legislative question, subject to judicial revision only so far as to see [sic] it is founded on real distinctions in subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine, the courts cannot declare the classification void, though they may not consider it as resting upon a sound basis. The test is not wisdom, but good faith in the classification").

<sup>40</sup> *State ex rel. Powell v. State Bank*, 90 Mont. 539, 4 P. (2d) 717 (1931).

<sup>41</sup> *McDonald v. Mabee*, 243 U. S. 90, 37 Sup. Ct. 343 (1917).

<sup>42</sup> *Ibid.*

<sup>43</sup> *Liverpool Ins. Co. v. New Orleans*, 205 U. S. 395, 27 Sup. Ct. 499 (1907).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.* See Carpenter, *Jurisdiction Over Debts for the Purposes of Administration, Garnishment and Taxation* (1918) 31 HARV. L. REV. 905, 906.

<sup>46</sup> *Liverpool Ins. Co. v. New Orleans*, 205 U. S. 395, 27 Sup. Ct. 499 (1907).

<sup>47</sup> Carpenter, *op. cit. supra* note 45, at 907.

<sup>48</sup> *Ibid.*

<sup>49</sup> *State Tax on Foreign-Held Bonds Case*, 15 Wall. 300 (U. S. 1872).

<sup>50</sup> *Ibid.*

*sonam*".<sup>51</sup> At present the court is disposed to hold that both the debtor's as well as the creditor's domiciles may have jurisdiction over intangible property.<sup>52</sup>

### III.

Unfortunately, however, the Act is ostentatiously defective in one respect. Insofar as the Act provides that, after an insurer notifies a policyholder in a case where a policy continues in force by virtue of its automatic non-forfeiture provision, and the insured fails to inform the insurer within a specified time that he has knowledge of such a non-forfeiture provision, "such policy will be *terminated* after such specified date, *notwithstanding any inconsistent provision of this chapter or of the insurance policy*",<sup>53</sup> it is void.<sup>54</sup> This is a retroactive feature of the Act which, it is submitted, dooms that particular portion.<sup>55</sup> This provision is not intended to furnish counsel or advice as to what conditions may be incorporated into life insurance policies to be made in the future. On the contrary the Act applies to contracts now in force.<sup>56</sup> In this respect it is deliberately calculated to modify and reform existing contracts.<sup>57</sup> It revises all life insurance contracts running under the automatic non-forfeiture provisions so as to effect an elimination of their insurance features unless the policyholders do something, which, under the terms of the contract, they have never obligated themselves to do. It was not the desire to alleviate conditions evincing want of understanding between the parties to the insurance contracts, nor to clarify ambiguous provisions in the contracts that the Legislature claims to be justified in drastically reforming existing contracts.<sup>58</sup> The Legislature, in attempting to justify its action, seeks shelter in the stronghold of the public policy doctrine.<sup>59</sup> One but wonders whether the drastic modifications of definite existing contracts in tranquil and peaceful times, when no

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<sup>51</sup> *Carpenter, op. cit. supra* note 45, at 905. See also *Farmer's Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 50 Sup. Ct. 98 (1930).

<sup>52</sup> *Curry v. McCannless*, 307 U. S. 350, 59 Sup. Ct. 900 (1939); *Graves v. Elliot*, 307 U. S. 357, 59 Sup. Ct. 913 (1939). See (1939) 14 ST. JOHN'S L. REV. —, for a discussion of these cases.

<sup>53</sup> N. Y. INS. LAW § 295, subd. 2(a).

<sup>54</sup> *Ramey v. Pyles*, 182 Ark. 320, 31 S. W. (2d) 533 (1930).

<sup>55</sup> *Standard Chem. & Metals Corp. v. Waugh Chem. Corp.*, 231 N. Y. 51, 131 N. E. 566 (1921); *Lewis v. Dunlop*, 112 S. C. 544, 100 S. E. 170 (1919).

<sup>56</sup> N. Y. INS. LAW § 295, subd. 2(b).

<sup>57</sup> *Standard Chem. & Metals Corp. v. Waugh Chem. Corp.*, 231 N. Y. 51, 131 N. E. 566 (1921).

<sup>58</sup> *Ibid.* See WEEKLY UNDERWRITER, Sept. 16, 1939, p. 539.

<sup>59</sup> N. Y. STATE FINANCE LAW § 44-h, subd. 3 (wherein these significant words appear: "It is hereby declared to be against sound public policy to permit policies to operate under their non-forfeiture provisions for a period of more than five years without affirmative evidence of knowledge on the part of the insured that his policy is in force and effect under its non-forfeiture provisions").



public emergency calls, will not subject sound public policy to a greater danger than it may possibly be subjected to under non-forfeiture policies operating without the insureds going to the trouble of notifying the insurers of their knowledge of such operation.<sup>60</sup>

Undoubtedly, it is high time that something be done with the unclaimed funds held by the life insurance corporations, and it is advisable that the state be the one to profit from such funds when the insured or his representatives cannot be located. Nevertheless, the end does not justify the means. Sound reasoning and honesty demand that the phrase "unclaimed funds" should not be confused with the reserves for insurance that is operating in accordance with an existing contract. Legislative fiat may not arbitrarily abrogate existing contracts.<sup>61</sup> The fundamentals of constitutional government do not condone strong-arm methods of abrogating existing contracts.<sup>62</sup>

Thus, unless the court finds that sound public policy requires the particular provisions under consideration, they would probably be held unconstitutional. However, these provisions, if found to be invalid, would not vitiate the Act in its entirety. The invalid part would be severable from the valid portion of the Act, and so the lawful part would subsist even though the invalid part would meet a judicial death.<sup>63</sup>

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<sup>60</sup> See WEEKLY UNDERWRITER, Sept. 16, 1939, p. 539.

<sup>61</sup> Standard Chem. & Metals Corp. v. Waugh Chem. Corp., 231 N. Y. 51, 131 N. E. 565 (1921).

<sup>62</sup> *Ibid.*

<sup>63</sup> Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 850 (1886). Indeed, the Legislature itself declared that if any part of the Act be adjudged unconstitutional, such judgment shall be confined only to such invalid portion of the Act, "and the legislature hereby declares that it would have enacted this act without such invalid part, provision or application if the validity thereof had been apparent." N. Y. STATE FINANCE LAW § 44-h, subd. 4.